(1) 83-1776

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

M. W. ZACK METAL CO.,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, et al., etc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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154 pp

I. QUESTION PRESENTED

May an Appellate Division of the New York Supreme Court refuse to take jurisdiction to review and determine whether the property rights or right to property of the petitioner were violated by the Supreme Court, New York County's denial of due process or the equal protection of the laws clauses of the Fourteenth Amendment to the United States Constitution in nine decisions made on motions which failed to assess the true facts though they were by law the admitted or conceded facts and failed to apply Statutory rights or the well-established law in the decided cases of New York and were on their faces, arbitrary expressions of false facts and inappropriate law, needed to support a conspiracy between a law assistant of the court, assigned to the motions, and, the defendants, which Conspiracy was reported to the Court and

to the administrative Judge of the Supreme Court and other official agencies but no action was taken to rectify or investigate the matter nor did the Appellate Division order a trial although such trial was duly demanded, but only caused retaliation by the decision-maker in later decisions in the same matters by refusing reargument without explanations for the claims by Zack but assessing penalties against Zack and its Attorney proving the intemperate treatment of the matter sub judice by replacing a calm discussion of the matter with bombast and unlawful exposition of the personal predilections of the law assistant, that there had been collusion between the assistant and the defendants, which facts were submitted to the Appellate Division on the inquiry before it, but the Appellate Division dismissed the petition on motion

by the Supreme Court, without a trial, or even a denial of the unconstitutional decisions sought to be reviewed, saying that separate appeals for such orders were the remedy, when such a decision was an abnegation of its jurisdiction granted by Section 7803 CPLR to review such orders on an application for a writ of prohibition and mandamus and the well-established decisional law of the State on the point holding that where constitutional matters are involved the preferred method of review is by application for said writs to correct the wrongs done?

Query? Wasn't the refusal of the Appellate Division to exercise its jurisdiction and the refusal of the Court of Appeals to grant permission to it serious Constitutional wrongs calling upon the powers of this Court to correct and vindicate the Constitutional violations not only for petitioner's sake but to

avoid criminality within the Courts of New York?

II. PARTIES BELOW

The parties to the proceedings in the Supreme Court, Appellate Division, First Department were:

M. W. Zack Metal Company

The Supreme Court of the State of New York, County of New York

International Navigation Corporation of Monrovia

Contam Linie

Newcastle Protection & Indemnity Association

The London Steamship Owner's Mutual Insurance Association Limited

Federal Insurance Company

La Morte Burns & Co., Inc.

Donald B. Allen

Hill Rivkins Carey Loesberg O'Brien and Mulroy, a law partnership, and,

"John Doe", said named John Doe is

intended to be a person whose name is unknown to the Petitioner, and who was appointed and employed by the Supreme Court of the State of New York, County of New York, as a law assistant in Special Term, Part 1.

Petitioner is a single corporation having no affiliation nor a subsidiary or parent corporation.

II. JURISDICTIONAL STATEMENT

This Article 78 proceeding was commenced in the Appellate Division, First Department on a petition pursuant to Article 78 CPLR as a separate proceedings from the suit and proceedings that were proceeding in the Supreme Court, New York County, to review on a writ of prohibition or mandamus nine orders of the Supreme Court, in a suit for fraud and a Special Proceeding under Article 78 CPLR to vacate subpoenae served to

enforce a judgment obtained by fraud and deceit upon a court, and a motion to hold the respondents and their attorneys for contempt of court for disobedience to a stay contained in an order made within the Special Proceedings.

The suit was to recover the damages for the fraud upon the German trial court by the conspiracy of Federal Insurance Company with the two insurers of the shipowner and charterer to arm the shipowner and charterer with the appearance of owning plaintiff's claim for the cargo damage by assigning Federal's alleged but nonexistant right of subrogation; and the Special Proceedings was to quash subpoenae duces tecum to enforce the judgment in the Federal Court against Zack which had been recovered by the frauds and deceit of the attorneys upon the Federal Court. The parties in that Special Proceedings were Zack's lawyer,

as petitioner, and the respondents were the lawyers for the shipowner and charterer and their insurers.

This Special Proceedings involving this request for certiorari was directed to the Supreme Court to prohibit it from enforcing the nine orders for lack of constitutionality because the nine orders denied due process and the equal protection of the laws and they were collusively contrived by the agreement of a law assistant employed by the Court and the defendants.

Though appeals had been duly filed, proceeding to a review by writ of prohibition and mandamus would provide a more efficient forum, for a trial could be had, not only of whether due process and the equal protection of the laws was properly denied, but also the facts of the frauds in all nine orders could better be proven and determined at a single, New York County

trial. Petitioners efforts to process these matters on paper were ignored constantly, not by a factual discussion of those issues but by covertly ignoring them or by discussing issues sometimes presented by the defendants or sometimes volunteered by the Court, or simply by silence.

The attack upon the nine decisions does not need to await evidence of money passing to the law assistant as had been suggested by the District Attorney of New York County. The crime of obstruction of justice could be proved by a willful transgression of the Constitutional protections. This Court has established that a mere violation of the Constitution by a judicial act is null and void. See Marbury v. Madison, 1 Cranch 137, 179 and Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, at p. 414: subjecting the participants to criminal sanctions would be a better deterrent and a more

effecacious one to avoid such transgressions on a national scale and lighten materially the load on this Court to review them.

The Supreme Court below was made the main respondent for review by writs these nine decisions. Also named as respondents here were the parties to the proceedings in the Supreme Court. No relief was asked against them. The authority for moving for a writ of prohibition or mandamus instead of relying on appeals, is Section 7803 CPLR and La Rocca v. Lane, 37 N.Y.(2) 575.

That case was decided by Chief-Judge Breitel. He plainly discusses the relative merits of the Article 78 proceedings and an appeal to provide a remedy from usurpation of power, preferring the Article 78 proceeding to the usual appeal. He found that despite the availability of the appeal, the facts of that case would

support a writ of prohibition to stay the court from interfering with the rights of a party. Obviously, in this case, there is a need for a writ of prohibition to prevent the operation of the unconstitutional decisions that were made. As a matter of fact, it was urged to the Appellate Division, that the unlawfulness of the decisions of the Supreme Court could be better determined as a group. A trial was demanded.

The Appellate Division dismissed the proceedings relegating the petitioner to its appeals. It effectively ended the equitable suit brought against the Supreme Court of the County of New York. This was a final decision unless overturned on appeal. The usual appeals are inadequate to cover all of the issues raised in the Article 78 proceeding. Accordingly, the order appealed from was in fact and in law, a final decision and appealable

under the appeal Statute and the Constitution.

Also, the effort of the petitioner was to prevent a crime that would cause it a loss of its property rights. Chief-Judge Breitel said, that the reason for deciding the issues in an Article 78 proceeding would be preferable to a review by appeal, were that facts could be tried and that would present additonal reasons to do justice, than a review of errors upon claims not submitted to the trial process. In fact, the State Court's refusal to exercise its jurisdiction is itself denial of due process.

Also, the Judge denying the motions to amend reported plaintiff's attorney to the Disciplinary Committee of the Appellate Division, First Department, for violating the Code of Professional Responsibility by accusations that the attorney had "falsely accused" the Judge of mis-

conduct. That was not a truthful statement at all. Calling attention to cases which state that a judge may not act as an advocate for a party in suggesting procedures for that party to follow, is a question of law not a false accusation. But such issue is not reviewable upon the ordinary appeal as it is an issue raised after the decision to be reviewed is made. Also, the dishonest overzealousness of the judge was not an issue in the Supreme Court until after his decision was made. These issues could very well be resolved at a trial. Appealing, to correct the errors, might create a new miscarriage of justice. There is no substitute for a trial before jury and it will avoid what has occurred here that issues are being tried on paper by decision-makers who will not be bound by the Constitution.

The decision of the Appellate Division dismissing this proceeding is er-

roneous and a final decision of the issue raised. As it involves constitutional violations, it is appealable to this Court.

The foregoing proves that a substantial Federal question was presented in the State Court not only in the Appellate Division but also in the Supreme Court on their motion to reargue the initial decisions of that court; but those courts refused to exercise their jurisdiction to decide it. The State Court of Appeals decisions of December 1, 1983 and January 17, 1984 were final decisions refusing to determine the constitutional questions presented which were the sole purpose for the institution of these Special Proceedings, that refusal had effectively ended with finality that proceeding. See, Construction Laborers v. Curry, 371 U.S. 542, and, its companion case, Mercantile National Bank v. Langdeau, 361 U.S. 555.

Thereafter this court decided Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 authorizing a "practical" approach to the matter of finality. The court in Matthews v. Eldridge, 424 U.S. 319, said that it was more concerned with the practical importance and consequences of a prompt decision of the Federal government rather than to find whether the judgment is final in the constitutional sense. It is the issue which has been tendered that is important. Also, in Foster v. District Court, 424 U.S. 382, the court decided:

> "A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court."

In Cohen v. Beneficial Loan Corp., 337 U.S. 541, the court stated that finality is a "pragmatic approach" to the question. That thought was upheld in Abney v. United

States, 431 U.S. 651 and Bradley v. Richmond School Board, 416 U.S. 696; and Gillespie v. United States Steel Corp., 379 U.S. 148, and Clark v. Williard, 292 U.S. 112. When the question is examined in this case it will be readily found that the State Court of Appeals has a different rule for determining finality than is applied in the federal courts. The Court of Appeals has time and again stated that it will not define finality. The federal courts have taken and defined it and said that finality is where the decision ends the issue in a cause which may be separate from the main case. These Special Proceedings were commenced in their own right by process and it was ended, without the court ever examining the question of constitutional dimension even though the facts which support the claims of unconstitutionality were never contradicted or contested either by the respon-

dent, the Supreme Court, or its co-respondents, the parties in the original litigation. Such an ending is a serious abnegation of the jurisdiction of the court in refusing to consider the constitutional rights of the petitioner because due process should be required in every court in the land.

The crass attitude of the judges and attorneys in this case shows a deplorable attitude that the Constitution is a dead letter thing of the past, adopted by the knowledge, that judges have absolute immunity, and this honorable court's permitting the avoidance of correcting constitutional errors are very plain indeed. The result is a lawlessness in the courts that is born of the willing that an honest lawyer will remain an honest lawyer but poor, while a miscreant smugly enriches himself.

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OCTOBER TERM, 1983

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Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, et al., etc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner M. W. Zack Metal co., respectfully prays that a Writ of Certiorari be issued to review the judgments and orders of the Court of Appeals of the State of New York dated, December 1, 1983

and January 17, 1984.

I. OPINIONS BELOW

The decision of the Appellate Division denying the application for a writ of prohibition and mandamus is dated September 20, 1983, and was published at 96 A.D.(2) 1028. Its order of November 22, 1983, denying leave to appeal to the Court of Appeals has not been published. The order of the Court of Appeals dismissing the appeal is dated December 1, 1983 and published at 60 N.Y.(2) 1015, and the decision of the Court of Appeals denying motion to vacate its order of December 1, 1983 or leave to appeal to the Court of Appeals is dated January 17, 1984 and is reported at 61 N.Y.(2) 560.

II. THE JURISDICTION OF THIS COURT AND HOW IT IS BEING INVOKED

The jurisdiction of this Court is

invoked by the order of the Court of Appeals dated December 1, 1983, dismissing the appeal without costs, and, its decision dated January 17, 1984, denying vacature of said order of December 1, 1983, or, leave to appeal to the Court of Appeals, dated January 17, 1984, which effectively extended the time of filing a Writ of Certiorari to this court to March 17, 1984.

III. STATUTORY PROVISION CONFERRING JURISDICTION OF THIS COURT:

28 U.S.C. Section 1257 (3); 28 U.S.C. Section 2106; see Appendix page A-1, for their texts.

IV. THE PROVISION OF THE CONSTITUTION INVOLVED IN THIS MATTER:

The Fourteenth Amendment to the Constitution requiring the State Courts to accord litigants due process and the equal protection of the laws, were unlaw-

fully violated.

V. A CONCISE STATEMENT OF THE CASE

A concise statement of the case is most difficult, because a recitation of events occurring in three Federal District Courts and appeals to the Circuit Court and to this Court and a recitation of events in the trial court of Hamburg, Germany and in the Appeals Court in Germany and in two suits in the Supreme Court of New York, and appeals to the Appellate Division and in the Court of Appeals, is necessary for the understanding of constitutional questions raised by the petitioner. The events leading to the petition under Article 78 CPLR which has led to this petition were attempts to review the nine orders of the Supreme Court by writs of prohibition and mandamus commenced in the Appellate Division but because that Court refused to pass on the constitutional question, and the Court of Appeals

refused to rectify that wrong decision, this was made necessary.

Involved, is petitioner's claims to damage to a cargo of steel sheets for use in the manufacture of automobile bodies, which were being imported from Europe during the steel strike of 1960. The sheets traveled in coils tightly bound by steel straps with their edges being sheared smoothly and evenly to avoid the cutting of their edges in transit. The coils were accepted for carriage at Antwerp, under a bill of lading marked "Clean on Board". The coils broke their stow on board ship on the journey to New York, arriving in seriously damaged condition, which damage was fixed after discharge, at a sale of the goods at arm length, at a price, producing a loss of $80,000.

Petitioner's own insurer, the Federal Insurance Company, insisted that the coils be sold as sound steel to American users

because of the heavy demand then prevailing for steel. That was attempted, but the attempt failed, and petitioner sold the steel, "as is, where is". Yet, Federal refused to accept the sale as measuring the damage and a suit was started against it in the Supreme Court, New York County. Also, the representative at New York for the insurers of the shipowner and of the charterer of the Severn River, took the same stand as Federal and refused to settle.

A suit was started against the ocean carriers, in admirality, in the Southern District Court of New York on February 11, 1961 to toll Cogsa's one year limitation to sue, delivery having been made on February 17, 1960. Also, petitioner applied for and obtained an extension of time to sue the ocean carriers from the agent in New York, representing the two insurers of the ocean carriers, to May 15, 1961. Such extension was in writing signed by the

agent for the charterer and the shipowner at New York.

Finding that settlement was not available from the carriers, when, suits were started in the Eastern District at NEW York and in the District Court of New Jersey on May 12, 1961, and another suit was commenced in trial court at Hamburg, Germany on May 13, 1960. The Suits in America were in admirality, against the ship, in rem, and the charterer in personam, ready to obtain jurisdiction when the Severn River arrived in New York. German counsel, employed by petitioner, prosecuted the suit according to the practice there.

The suit against Federal proceeded to two trials and two appeals and was on the third trial when it was settled for $40,000., and the further understanding that plaintiff was to continue to press for full recovery of the damage from the tort-feasers, and, from the recovery, if

any, it would account to Federal for 55% of the net proceeds. Sometime after this settlement, it appeared that Federal Insurance and the insurance carriers for the shipowner and the charterer agreed among themselves to arm the shipowner and charterer with a claim that they were the owners of the plaintiff's claims for damage by reason of getting an assignment from Federal Insurance Company of their subrogation rights which they believed they had, by operation of law. In 1970, they concluded a deal whereby Federal gave an assignment of its rights to the shipowner and the cherterer for $1,500. Immediately thereafter, the shipowner and charterer filed a defense in the Court in Germany to withdraw plaintiff's claims in that suit. The case went to trial, and on June 15, 1971, a judgment was recovered by the plaintiff against the charterer for more than $64,000. On December 7, 1971, the

German Court made a further decision awarding a judgment against the shipowner in the same amount as the award against the charterer but it limited execution on the judgment to a levy upon the Severn River saying at the same time that the Severn River was then engaged in commerce and was travelling the high seas. In fact, she had, three to four years previously struck rocks in the Far East and had become a total loss to navigation. plaintiff knew nothing about that foundering but the shipowner did not reveal the truth of the matter to the Court; it kept insisting upon a limitation of the collection upon the judgment to a levy upon the Severn River. The German Court had been deceived. Appeals were filed from both decisions. The shipowner refused to file an undertaking to stay execution of the judgment, but on behalf of the charterer, Newcastle, the insurers of the char-

terer, offered an undertaking to pay pursuant to a final decision of a German court if plaintiff would agree to refrain and which it did, from levying execution upon the assets of the charterer, pending appeal. Petitioner then, attempted to enforce the judgment against the shipowner by actions in America and those defendants continued shamelessly, and impervious to the demands of the law, to find ways and means to subvert justice by falsifying facts and prosecuting them with claims to law which were not applicable. The whole sordid story of these efforts are set forth in the petition and affidavit in support of petition filed in the Appellate Division in New York on the Article 78 proceeding.

Here it is more than 23 years later, and Zack has not collected a cent from either ocean carriers, but, has paid a judgment for costs for $1,365 and it is

continuing to seek an enforceable judgment for the $80,000 of damages to its steel and, for expenses exceeding several hundred thousand dollars incurred in new litigation caused by the unlawful actions of various defense counsel who have practiced deception upon the courts, making it necessary to prosecute this application for writs.

Zack has had to litigate its rights to recover in three Federal District Courts in each of which the decision of the Court for dismissal was induced by deceitful and fraudulent statements of facts by defense counsel and in each case, the decision was appealed to the Circuit Court of Appeals and then to this Court, where certiorari was denied.

There was also a full scale litigation in the courts of Germany, where recovery was made for more than $65,000. That was in 1971. Again, not a cent has

been paid on that judgment nor on the guarantee of Newcastle given to stay execution upon the charterer though that judgment was affirmed in 1975.

The application in the Appellate Division of New York, was caused by decisions made within the action for fraud of all three insurance companies who conspired to defraud the German Court in 1970. In the interim, the litigation was continued in the Federal Courts of Norfolk, Virginia, in the District Court of New Jersey and in the Sourthern District Court of New York. Yet, the same outrageous decisions were made to prevent judgments for Zack that could have ended its chase for justice.

In Norfolk, Virginia, an action was started by Zack, obtaining jurisdiction by attachment, of a sistership, the "Virtus". The libel stated the usual cargo damage claim and also it alleged

the claims that the judgment in the suit in Germany against the shipowner created rights that could be enforced by the Court in Norfolk. The defense, as stated by defense counsel, was that the judgment was an "in rem" judgment and therefore, the collectability under it was limited to a levy upon the vessel. It must be remembered that the vessel had sunk before the judgment was made. She had never been in the custody of the German Court. Furthermore, they alleged the suit was time-barred by Cogsa. There were several other statements of reasons for non-liability which the District Court used to base its dismissal of the complaint. In that suit, the alleged defense that the judgment was an "in rem" judgment was upon an affidavit made by the same German counsel who had deceived the German Court in restricting the

judgment against the shipowner to a levy upon the sunken vessel. He likened that judgment to an "in rem" judgment just like that in America but conveniently omitting to mention that the vessel had never been arrested and was never in the custody of the Court.

Yet the suit was dismissed. An appeal was taken and the Appeal Court's decision disallowed all grounds of dismissal except for the bar of Cogsa's limitation and the claim that the German judgment was equivalent to an "in rem" American judgment. Practically simultaneously with that decision, the German Appeal Court published its decision of January 9, 1975. That Court affirmed the judgment against the charterer but in the reduced amount of $33,000, saying Cogsa's $500 per package limitation would apply because the ship had admitted that at least 66 coils had lost their straps. It said nothing about the rule that damages are fixed by the sale of the whole lot "as is, where is".

Cogsa does not limit the loss as declared by the German Court but the limitation is applied to the whole shipment. As to the shipowner, that Appeal Court dismissed the complaint. A motion to reargue was made citing cases holding that where a timely suit was commenced, Cogsa's time limitation could not affect a later suit on the same claim. Also, Zack claimed that dismissal as to the shipowner in Germany, destroyed the defendant's claim that there was a limitation upon the levy of execution on the vessel. That limitation ended by the dismissal. The dismissal was continued because of the judgment, see 510 F.(2) 451. A writ of certiorari was denied by this Court, 422 U.S. 835.

The dismissal in the German Court of Appeals was made because it said that the ship's agent who had signed the letter extending the time to sue to May 16, 1960,

did not have authority to sign that letter for the shipowner. The truth was that the ship's agent was given authority to sign the letter by the insurers themselves. Again, another disgraceful attack upon the integrity of the courts had resulted in relieving the shipowner from liability in that law suit.

Then in the New Jersey District Court, Zack found that the action commenced there in 1961 had been dismissed without prejudice to restoration on its call calendar in 1964. Zack moved to restore that case to the calendar and sought permission to amend the libel by changing the respondent from the vessel to a suit in personam against the shipowner. Though the application was commenced as an ex parte application, the District Court, for reasons best known to it, required the appearance of the shipowner on the motion. Plaintiff sent copies of

all papers on the motion to shipowner's agent in Baltimore, who was given authority by the insurer to appear. That counsel argued that the action was barred by the judgment in Germany which allowed a recovery of $33,000 from the charterer, and in any event, that the time-bar of Cogsa was effective. Despite plaintiff's argument that the time-bar had already been decided by the Fourth Circuit against them. Nevertheless, the Court denied restoration of the case because of the two false claims of a time-bar and of res judicata. An appeal was taken to the Court of Appeals which affirmed that decision and why, wasn't stated. An application for a writ to this Court was denied.

Zack then commenced an action in the Southern District of New York because it felt that the past judgments being based on fraudulent acts could not be

enforced. The complaint set forth the original claim for cargo damage, separate claims against the insurers of the ocean carriers upon their policies, a fourth cause of action based upon the undertaking of Newcastle to pay the decision of a German court, and a fifth cause of action alleging the frauds of the insurers for the ocean carriers in all the preceding suits. The defendants were the shipowner, charterer, each of their insurers, and the New York agent of those insurers, La Morte Burns Company. Counsel for the defendant was a Donald B. Allen, Esq., counsel appointed by the insurers, though his firm filed appearance for the record. Mr. Allen was the attorney for those insurers involved in the fraudulent deal in which the purchase and sale of the alleged subrogation rights of the Federal Insurance Company was arranged. He vowed in a letter now

in evidence, that he would base his defense of the suit by attacking the plaintiff's counsel with harassing claims, to overpower him. In addition to the general denial of the complaint, he included a counterclaim for malicious prosecution against Zack, without stating any facts in support. Zack needed discovery proceedings but Mr. Allen fought to prevent a normal calm discovery according to the established law. He refused to permit witnesses to answer questions or produce papers so as to require motions to compel his clients to do so, but then he would litigate the interpretation of the record of facts and of the decisions that were made. The District Court seemed to be one who preferred to adopt a presumption of the honesty of counsel and of proceedings undertaken by this defense counsel. The examinations of the agent, La Morte Burns & Company, was truncated

by orders of the Court with little useful information having been obtained. The examination of the records of the insurance company were subjected to this same unlawful activity.

In fact, Mr. Allen was on the attack against Zack's attorney and claimed that the examination was not obstructed by him, but by the plaintiff's attorney. The Court ended the examination and ordered a trial of the case, with less that 20% of the records of the insurance companies having been examined. Yet, in the interim, defense counsel moved to dismiss the complaint. Those motions were based on false arguments such as Zack owed Newcastle money for which Newcastle had a lien. No facts in proof were submitted. A memorandum of law only, was submitted, in which the claim to false facts were recited. This was atrocious conduct by a lawyer but, never-

theless, they succeeded in causing a denial of plaintiff's cross-motion for summary judgment against Newcastle which was supported by the written guarantee and the judgment of January 9, 1975, which had affirmed the judgment appeal from, yet, the Court disregarded this proof and denied the motion on the basis of the false facts which was put before the Court by Allen. The Court ordered a trial on the guarantee put before him, instead of a jury which had been duly demanded.

Upon the same papers, the Court dismissed the balance of the complaint stating that the cargo damage claim was time-barred, the causes of the action against the insurers on the ground that their insurers were not liable. The fraud counts, which he called orchestrated frauds in his decision, but instead of acknowledging the presence of questions of facts, or the fact that those claims

had never been contradicted, he concluded unlawfully, that no frauds had been committed. This was a denial of due process and a violation of his oath of office. Appeal to the Court of Appeals resulted in a 2 to 1 decision in favor of affirmance. Certiorari was denied. These sucesses without proof were, in fact, a categorical miscarriage of justice.

Also, as on the trial of Newcastle's written guarantee the proof was of the guarantee, of nonpayment and of the final decision of the German Court of January 9, 1975 and plaintiff offered proof of damages arising out of the breach of the promise to pay. The Court asked Mr. Allen if he had any motion to make. Mr. Allen moved to dismiss on the obviously flase ground that the guarantee was conditioned on proof of a final judgment awarding a sum of money to plaintiff against Newcastle. There was no such

proof, none was needed as there was no language in the guarantee that even remotely resembled that payment was conditioned on a "judgment" being entered on the decision. The guarantee stated that it would pay on a decision and had nothing to say about paying on a "judgment". The Court dismissed the claim without prejudice because it said that it appeared from the evidence that Newcastle owed Zack some money.. The Court refused to assess the evidence of the damages claimed, though uncontradicted. A peculiar thing about that District Court Judge: he took time out to castigate Zack's counsel for seeking to defend himself against the machinations of defense counsel. He felt compelled to take Allen's false statements for the fact, irrespective of whether they were true or not true, and, without proof. Yet plaintiff offered contradictions by writings proving

the truth. That was carrying the presumption of honesty in court decisions too far, by cutting off proof of the deceptions. This Court treated with that in the petition for certiorari under Docket #82-237. It will find proof of these complaints about Mr. Allen in the appendices filed in that matter.

The following proceeding then occurred in the Supreme Court, New York County resulting in the orders under review. In September of 1982, Zack moved within the cause of action commenced in 1970 in the Supreme Court, New York County, against all the insurers who had dealt with the alleged subrogation rights of Federal, to amend that complaint by adding two new causes of action. The first was on the guarantee of Newcastle and the second stated a cause of action against Donald B. Allen, Esq. and his principals for fraud upon the Southern District

Court, as is provided and mentioned by Section 487, of the Judiciary Law of New York; but the Court said, in its decision denying such motion, that the dismissal by the Federal Court of the fraud counts, in that suit, was effective to prevent a trial of the frauds by Mr. Allen in this suit. This is a mixed up, unlawful treatment of the facts of the new claims. The decision was unconstitutional as it did not dispose of the real issues. The decision even suggested to defendants that they move to dismiss the complaint in the suit that was pending. Yet, no such motion had been made by defendants. Zack, on reargument, claimed the Court had failed to discuss the claim against Newcastle and to the fact that its suggestion to defense counsel to move to dismiss the complaint altogether was contrary to the rule of the cases, which say that a judge may not act as an ad-

vocate for one party in the litigation. The second dedision was made worse than before and completely unconstitutional, saying that the dismissal of Zack's claim against Newcastle "without prejudice", made in the Federal Court, was barred by the Federal Court's dismissal. Res judicata barred the suit, even if it had been dismissed "without prejudice", meaning, that it could be sued on again. That Court's order of denial was also used to castigate plaintiff's counsel for accusing the Court falsely, of misconduct, without specifying the conduct. Later, the Court reported plaintiff's attorney to the Disciplinary Committee of the Bar Association, stating untruthfully to that Committee that plaintiff had attacked the integrity of the Court in an unlawful manner. This attack by the Court upon plaintiff's attorney was retaliation for not accepting the Court's unlawful

decisions. A third decision was made on a new motion for reargument made in an attempt to bring the law in clear perspective but in that third decision the Court assessed a separate bill of costs and again failed to discuss why Zack's requests for relief were unlawful.

Also, Zack and its attorney were served with subpoenae duces tecum, pursuant to 5224 CPLR to enforce a judgment for costs of $1,365, entered in the Federal Court upon false claims of Mr. Allen that that sum was for costs expended by him on plaintiff's appeal to the Court of Appeals, whereas, the bills submitted showed, on their face, that the items were for the cost of his own appeal from the denial of his counterclaim for malicious prosecution. Such false statements had been called to the attention of the District Court Judge,

but the latter refused to correct the situation. Because of such deceit by Mr. Allen that judgment is not enforceable in the law. It is subject to being set aside in equity proceedings. Accordingly, a Special Proceedings was commenced in the Supreme Court of New York County, to quash the subpoenae as resting upon a fraudulent judgment. The decision of the Supreme Court was that the petition be dismissed as the plaintiff could vacate the judgment in the Federal Court. This was an abnegation of its jurisdiction since the Supreme Court of New York County, is a court of general jurisdiction, empowered by the Constitution of New York to determine all questions arising whether in equity or in law. See Article 6, Section 7. Two additional attempts to convince the Court that it should exercise its jurisdiction in the Proceedings to quash the

subpoenae, and, to try the issue of fraud itself under its powers in equity, failed. Yet, the unconstitutionality of these decisions were carefully called to the Court's attention, but it refused to reverse the decisions, ignoring its obligation of due process.

During the motion to reargue the motion to quash the subpoenae, Mr. Allen threatened to move in Federal Court to hold Zack and the attorney for contempt for failure to answer the subpoenae. The rule is stated in Rule 45(d) FRCP that an information subpoena served, is subject to the right of the person served with that subpoena to avoid contempt by moving to quash the same. Special Proceedings were begun to quash the subpoenae. Mr. Allen moved in the Federal Court to require obedience to the subpoenae. Zack moved for a temporary stay against Mr. Allen and his firm with-

in the Special Proceedings. But, though duly served by the order staying enforcement of the subpoenae, Mr. Allen proceeded blindly to get a favorable decision from a Federal Court Judge who had been granting all applications which he would make to that Judge. Sure enough, he caused Zack to be held for contempt. Zack was fined $100 for each day the subpoenae were not answered. The motion to hold Mr. Allen and his firm for contempt was heard after the Supreme Court denied reargument of the Special Proceedings. Yet, the disobedience of the Supreme Court order occurred unlawfully, and there had been a deliberate disobedience to that State Order.

In all of these orders made by the Supreme Court of New York County we see that the orders made were clearly not only erroneous and against the facts, but they

were arbitrarily denied. No relief was in fact, granted to Zack, despite existing law whether under the statutory law or well-established law and the facts were never denied or contradicted. In addition, the motions to reargue made those errors very clear to the courts as violations of the Constitution, for lack of due process and the equal protection of the laws required by the Constitution. Zack called the Court's attention, not only to the applicable law requiring the grant of relief demanded by Zack, but also the courts were requested to stay within Constitutional bounds and to obey their oaths of office to accord Zack, Constitutional due process and equal protection of the laws. Zack's effort was conducted in a scientific and lawyer-like submission of the facts and the law. Zack acted to induce those dealing with the matter

in litigation to stay within the limitations of the powers of the courts limited by the Constitution. The reaction of the Court was a refusal to accord due process or the equal protection of the laws. In fact, it was a frustrating experience for counsel to perpare valid reasons why the relief should be granted and yet denial would be the answer--an unconstitutional act. Clearly, the action of the Court failed to abide the Constitutional restraints upon their actions, deliberately and obstructively. On the other hand, Mr. Allen was complaining about the expense which he was undertaking to meet these attacks by Zack. He kept demanding that Zack be assessed extra costs and penalties because of such heavy expense of their alleged defense. It was easy to conclude that Mr. Allen was paying for these decisions. Zack sought help from the Supreme Court and from

the District Attorney of New York County. The District Attorney expressed his view that he believed that the decisions were fraudulently obtained but he wanted proof. He suggested that Zack conduct a deposition of the records of the insurers of the ocean carriers to learn if money had, in fact, been paid by them. A motion was duly served for the examination but that was followed by a motion for a protective order and no examination to date has taken place.

A letter was addressed to the administrative judge of the Supreme Court requesting the name of the law secretary who had handled the motions. In New York County, the practice is that all motions, though returnable in Special Term, Part I, are read by a law secretary who makes a report of what is in the papers to the judge sitting. The administrative judge wrote a letter back,

saying that it was against the policy of the Court to give that information. Also, a letter of complaint was made to the Commissioner on Judicial Conduct, but that Commissioner wrote saying that it had no power to review errors of Constitutional laws. How does Zack then, protect its Constitutional rights?

A petition was prepared respecting the nine orders of the Supreme Court just described, suggesting a review by a writ of prohibition and mandamus by the Appellate Division, to correct the Supreme Court's failure to abide by its duty to abide by the Constitutional limitations of its jurisdiction. A trial of the factual issues, if raised, was asked for. The Appellate Division dismissed the petition. It said separate appeals were available. The Court of Appeals dismissed the appeal because

of lack of finality. Both Courts failed to note that this was a Special Proceedings having its own beginning and a special need for its powers to intervene. Such facts to support such separate proceedings, were proven and showed the Court's jurisdiction to consider it; and its duty was to determine the issue of constitutionality presented. Both Courts refused to use their powers to aid a sorely tried litigant trying to realize its constitutional rights. The petition in these Special Proceedings stand dismissed. This does not sound like justice in the State of New York or in the United States. It is a real, live, stinking occurrence in the annals of modern-day justice.

REASONS WHY THIS WRIT OF CERTIORARI SHOULD BE GRANTED

The Court of Appeals of the State of New York has decided an important question of Federal law which has not been, but should be, settled by this Court; or it has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

The nine decisions of the Supreme Court that are claimed to be unconstitutionally decided are set forth in the Appendix, starting with p. A-25 The following cases state the norm for constitutional decisions made by this Court. Additional cases that have held that a court may not violate the Con-

stitution are Ex Parte Virginia, 100 U.S. at p. 346; Brinckerhoff-Faris v. Hill, 281 U.S. 623; and Mitchum v. Forster, 407 U.S. 225. Due Process was denied, this Court said, when a State's demand for a fee for filing a suit to litigate her rights, was one which she could not afford, in Boddie v. Connecticut, 401 U.S. 371.

Also due process is denied when a court acts arbitrarily and capriciously in violation of well-established law, see Bouie v. Columbia, 378 U.S. 347; American Railway Express v. Buckley, 271 U.S. 323; and Giacco v. Pennsylvania, 382 U.S. 399. In Holden v. Hardy, 169 U.S. at p. 390, 391, this Court said that Courts may not so construe due process as to leave Congress free to make any process, "due process of law" by its will. In Escoe v. Zerbst, 295 U.S. 490, a lower court who would not follow the plain

terms of a statute, was said to act in violation of the Constitution. In Hodges v. U.S., 203 U.S. 1, 16, quoting Gibbons v. Ogden, 9 Wheat. 1, 188, stated that due process is denied when a court fails to follow well-established law. Foreclosing a party's proof of an essential of his case is a denial of due process, see Bell v. Burson, 402 U.S. 535 and Miss. & P. Rwy. v. Mackey, 127 U.S. 205. So is a refusal to hear, a denial of due process, see Edwards v. Keasrey, 96 U.S. 595. In Nebraska Free Press v. Stuart, 427 U.S. 529, the Court said, due process requires a "fair and impartial" trial. See also, Merchants Bank v. State Bank, 10 Wall. 604, stating that a court's duty is to pronounce the legal result which follows from the proof of the facts.

In Morhous v. Supreme Court of the State of New York, 293 N.Y. 131,

the Court's Chief-Judge Lehman said,

> "Where a court having jurisdiction to redress the prohibited wrong, fails to accord to the injured person the recovery to which he is entitled, due process is denied."

In Goldberg v. Kelly, 371 U.S. p. 271; McDonnell v. Wolfe, 418 U.S. 539; Morrisey v. Brewer, 408 U.S. 471, due process was said to require attention by the courts to stay within the bounds of the law. In Roberts v. U.S. ex rel Roberts, 176 U.S. 227 and Wilbur v. U.S. ex rel Kadril, 281 U.S. 206 the courts said,

> "Statutes imposing rules of practice are binding upon the courts and are not subject to interpretation."

The following cases state that statutes must be obeyed by the courts as they are an expression of a legislature's duty to make the laws. It is the duty of the court to interpret those laws, if, their language needs interpretation. These principles are stated by this Court

in various ways in Southern S.S. Co. v. N.L.R.B., 316 U.S. 31, 62 S.Ct. 886, 86 L.ed.(2) 1246; U.S. v. Henning, 344 U.S. 66, 73 S.Ct. 114, 97 L.ed. 101; Evans v. Abney, 396 U.S. 435, 90 S.Ct. 628, 24 L.ed.(2) 634; and in Hobbs v. McLean, 117 U.S. 567, 68 S.Ct. 870, 29 L.ed. 960. Mr. Justice Reed's famous quote that statutes should not be misinterpreted, appears in Stoll v. Gottlieb, 305 U.S. 165, at p. 171. Also, Ex Parte U.S., 242 U.S. 21, this Court, at P. 42, aptly describes a court's presumptuous attempt to state an interpretation of the statute its way rather than as is stated.

The nine orders that violate the Constitution in the manner just stated are reproduced in the Appendix starting with A-25 and going through A-50. All were orders of the respondent, the Supreme Court, County of New York.

The first three were made by the Hon.

Stephen G. Crane, on the motion of petitioner for permission to amend and supplement the complaint in the suit for fraud upon the German Court where petitioner's suit against the shipowner and charterer was progressing. That fraud suit was started in 1970. The first motion had attached to it, a copy of the proposed complaint, which included a new cause of action against Newcastle, on the guarantee, (third) and the cause of action under Section 487 of the Judiciary Law, for fraud and deceit upon the Court, at New York, against the attorney Donald B. Allen, Esq., a copy of which appears in the Appendix at A-46 et seq.

The first order (A-25) denies the motion but has nothing to say about the claim against Newcastle, nor about the fraudulent actions of Mr. Allen enumerated in the fourth cause of action, but it talks about the decisions of the Cir-

cuit Court, Second Department, 675 F.(2) 525, which affirmed the dismissal of the fraud count in that action. That complaint states deceptions upon the courts in Germany, Virginia, New Jersey and Circuit Court at Philidelphia. The proposed complaint was concerned with the frauds in the District Court and the Second Circuit and in State Court. That decision fails to discuss the issues raised. Ovviously, it avoids those issues and the facts supporting them. Those facts are the conceded, admitted and uncontested facts, as they are supported by writings, that were not contradicted by the opposition offered. Also, the decisions relied on two cases which are inapposite. Thus, the decision violates due process.

The second order of Crane, J., is at A-28 --A-35 . This was on the motion for reargument of the first. Though

granting reargument (A-29) it denies the relief for violation of the Constitution. It concedes that the third cause against Newcastle was not discussed in the decision, but it refused to permit plaintiff to plead it because it simply said that the dismissal of that same case in the Federal District Court, "without prejudice" was barred, despite the facts, which the Court acknowledged, that that dismissal of the District Court was made because the proof was that Newcastle owed Zack money. The Court's excuse was to add words of its own choosing to support its words and ideas that were not advanced by parties opposing the motion. This is proof of arbitrary conduct by the Supreme Court. It also, is unconstitutional. Moreover, it violates the Statute CPLR 3025, (A-3). It repeats the Sherpata case which is inapposite and it continues to misstate the complaint's

allegations of frauds that were decided by the Federal Court, when that Court had only frauds committed on different dates and under different circumstances than the frauds in this case. It persists in relagating the frauds to that Court where the frauds were committed without understanding the effect of Section 487, making lawyers responsible for their deceptions upon all courts in New York. Finally, the decision goes on to express the personal predilictions of the law assistant, the architect of this decision, by misconstruing the attorney's proof of cases holding that courts may not suggest or advocate proceedings to parties in a litigated matter by suggesting procedures to take. The Court suggested to report the attorney to the Bar Association for accusing the Courts, without specifying, except to state the untruth by citing the Code of Professional Responsibility. The plain

truth of the matter is that that law assistant had made a personal attack upon this attorney, with false statements. He showed a disqualifying personal interest in the matter. The effect of that was both a denial of due process to both client and attorney. Later, that Judge wrote a letter to the Disciplinary Committee of the Bar Association, uttering misstatements of the proceedings to support his claims; but he did not succeed, as the truth was proven to that Committee.

The third decision (A-36) is another example of Judge Crane (plus the law assistant) violating the Constitution by assessing a penalty bill of costs. The purpose was obviously to discourage petitioner so that it would accept the unlawful decision that he had made.

The fourth order, unconstitutionally made, was the order of Hon.

David B. Saxe, decided January 4, 1983 (A-37) denying a petitioner's request to quash subpoenae duces tecum. Those subpoenae were in proceedings supplementary to a judgment of Federal District Court for costs of $1,376. But that judgment was made because of the fraud and deceit practiced by Mr. Allen, when he offered bills incurred for his own appeal papers at the Circuit Court to reverse the decisions desmissing his claim for malicious prosecution based upon the bringing the suit in that District Court. He induced the Clerk of the Circuit Court to accept those bills as costs incurred in defending against the appeal of the plaintiff. A motion to the District Court to vacate that judgment was made. It was denied and an appeal to the Circuit Court did not correct the error. These two Courts failed to correct plain falsehoods. The peti-

tioner reasoned that as the judgment could not be enforced, in equity, because of the frauds, it would move to quash the subpoenae under Section 2304 C.P.L.R., inasmuch as Mr. Allen had written a letter when serving the subpoenae, saying that they were being served under 5224 C.P.L.R. That opened the way to prove the fraud in obtaining the judgment. But that decision says that the fraud should be set aside in the Federal Court.

This was not the grounds for denial espoused by the respondent, but it was a ground for dismissal of the proceedings made by the Court, on facts not appearing in the record. But the law assistant, reading the papers, was the same. That law assistant did not cite any case to support his point, but the law is that the Supreme Court is a court of plenary jurisdiction to decide matters of equitable nature, as well as

of law, see the New York Constitution Article 6, Section 7. That decision denied due process and was unconstitutional. A motion to reargue was made, calling attention to the plenary power of the Supreme Court to decide matters of equitable nature and that the fraud alleged should, at least, go to trial.

To be sure that the Court was apprised of the fact that it had violated the Constitution, petitioner cited many cases on the point to the Court, but the decision (A-41) of the Court, ignoring the well-established law controlling to the question of quashing the subpoenae, and, a second unconstitutional decision was made. This time the decision was made with knowledge of the law it was violating and the decision, ignoring that law, is a deliberate refusal to abide by the law. This is proof of arbitrary action and a woeful disregard

of the Constitution. A second motion to reargue was made and the Court, despite the terms of Rule 45(d) F.R.C.P., granting a stay of proceedings to enforce a subpoena, held Zack for contempt and even threatened action against the attorney who was prevented by privilege, from testifying about his client's affairs without his consent. In moving to hold Zack for contempt, the lawyers for the judgment creditors had violated the order of Judge Saxe, staying them from proceeding as they did, pending a final decision in the matter before him. A motion was made to hold the lawyers for contempt. In opposition, there was an affidavit by Mr. Allen. He said there should be a denial because of the many irrelevant matters he had set forth in an effort to evade the truth of their disobedience, and winds up with a flat demand for denial. The claim that the

law firm was not a real party to the proceeding was argued in the first motion. The Judge was the Honorable Richard W. Wallach. His decision of March 8, 1983 states the issues, but it also states an untruth supplied by Mr. Allen (A-43) that he moved for contempt in the Federal Court because he had permission to do so by a decision of the Federal Court, ante-dating the order granting the stay. It just so happened that Judge Saxe's second order, ending that proceeding was published on February 17, 1983, but petitioner had taken an appeal from that order of Judge Saxe so that whether the failure to obey the restraining order had caused the petitioner any damage could not be known until the appeal was decided. Judge Wallach did not stop to consider that phase of the matter but proceeded to deny it because of no injury. Then the last provision of that order grants

relief not only not asked for, but also it was the grant of a judgment of dismissal of the proceeding which was not before him. This provision proves that the same law assistant was at work correcting his failure in the main proceedings. His making that decision in this motion is a determination made without notice to the petitioner on charges in writing, a classical deprivation of due process. But what is more, it proves that that order was made by the same law assistant that had acted in the other orders of the Supreme Court, proving a planned action to obstruct justice and to violate the Constitution.

A motion to reargue was needed to tell about the unconstitutional acts in the first order; offering proof of Mr. Allen's deceitful actions and of citing cases to show that the court's treatment of the issues were unconstitu-

tional. The decision, adamantly stuck to the denial and to prove that it made a correct decision, it misstated the record. Facts to hold the restraining orders were void, misinterpreting a decision of this Court and calling petitioner's claims to false facts by Mr. Allen, scurrilous, for which reason he awarded costs additional to the regular costs that would be granted on the entry of judgment of this sort. This was a brutal handling of petitioner's pleas to confine himself to constitutional bounds, no doubt, supported and inspired by the everpresent law secretary, whose personal interests did not lie in upholding the constitutional limitations, whatever power he presumed to wield in his job.

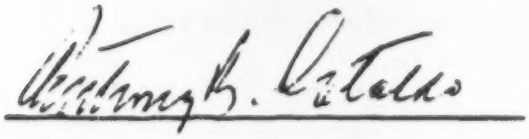
The ninth order was a direction by Judge Wallach placed across the page of an order to show cause, being sub-

mitted for his signature, to initiate a third motion to have him recognize that he had relied on facts de hors the record to make his second decisions. With the word "refused" written across the face of the proposed order, he ended that effort by the petitioner to find a judge who would read and understand what this country stands for.

CONCLUSION

For the foregoing reasons, this Writ of Certiorari should be granted and the judgment of the Court of Appeals of December 1, 1983 should be reversed and the appeal heard by this Court. As the facts involved are recorded in the proceedings below perhaps this Court will direct that petitioner's applications for relief should be granted summarily.

Resepctfully submitted,



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APPENDIX

STATUTES

United States Code, Title 28 - Judiciary and Judicial Procedure

28 U.S.C. Section 1257 (3)

28 U.S.C. Section 2106

United States Code, Title 28, Section 1257 (3) State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari,... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

United States Code, Title 28, Section 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

CONSTITUTIONAL PROVISIONS

AMENDMENT XIV

Section 1, ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws.

CIVIL PRACTICE LAW AND RULES OF NEW YORK

Section 104. Construction

The civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceedings * * *

Rule 3025. Amended and supplemental pleadings

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and supplemental pleadins by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent trans-

actions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be granted freely, and... .

(c) Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidences, upon such terms as may be just, including the granting of costs and continuances. * * *

Fule 3216. Want of prosecution

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any part, who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own

initiative or upon motion, may dismiss theparty's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in action;

(2) One year must have elapsed since the joiner of issue;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and

further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

(c) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule serves and files a note of issue within such ninety day period, the same shall be deemed sufficient compliance with such demand and diligent prosecution of the action; and in such event, no such court initiative shall be taken and no such motion shall be made, and if taken or made, the court initiative or motion to dismiss shall be denied.

* * *

(e) In the event that the party

upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such ninety day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

* * *

Section 7803. Questions raised

The only questions that may be raised in a proceedings under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

Section 2304. Motion to quash, fix conditions, or modify.

A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

* * *

Rule 5224. Subpoena; procedure

(a) Kinds and service of subpoena. Any or all of the following kinds of subpoenas may be served:

1. a subpoena requiring attendance for the taking of a deposition

upon oral or written questions at a time and place named therein; or

2. a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein; or

3. an information subpoena, accompanied by a copy and original of written questions and a prepaid, addressed return envelope. Service of an information subpoena may be made by registered mail, return receipt requested. Answers shall be made in writing under oath by the person upon who served, if an individual, or by an officer, director, agent or employee having the information, if a corporation, partnership or sole proprietorship. Each question shall be answered separately and fully and each answer shall refer to the question to which it responds. Answers shall be returned together with the orig-

inal of the questions within seven days after receipt.

(b) Fees. A judgment debtor served with a subpoena under this section shall not be entitled to any fee. Any other person served with a subpoena requiring attendance or the production of books and papers shall be paid or tendered in advance authorized traveling expenses and one day's witness fee. Any other person served with an information subpoena shall not be entitled to a fee where the state, a municipality, or an agency or an agency or officer of either, is the judgment creditor.

*** *** *** *** ***

JUDICIARY LAW--
ATTORNEYS AND COUNSELS

Section 487. Misconduct by attorneys

An attorney or counselor who:

1. Is guilty of any deceit

or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or

2. Willfully delays his client's suit with a view to his own gain; or, willfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

ORDER OF APPELLATE DIVISION

Dated September 20, 1983

At a term of the
Appellate Division
of the Supreme Court
held in and for the
First Judicial De-
partment in the Coun-
ty of New York, on
September 20, 1983

Present - Hon.

Leonard H. Sandler Justice Presiding

Joseph P. Sullivan

John Carro

Sidney H. Asch

E. Leo Milonas, Justices

----------X

M. W. ZACK METAL COMPANY, :

Petitioner, :

:

- against - :

THE SUPREME COURT OF THE :

STATE OF NEW YORK, COUNTY :

OF NEW YORK, INTERNATIONAL :

NAVIGATION CORPORATION OF :

MONROVIA, CONTAM LINIE, :

NEWCASTLE PROTECTION & : 17274

INDEMNITY ASSOCIATION, THE : (M-3459,

LONDON STEAMSHIP OWNER'S : M-3654,

MUTUAL INSURANCE ASSOCIATION : M-4012)

LIMITED, FEDERAL INSURANCE :

COMPANY, LA MORTE BURNS & CO. :

INC., DONALD B. ALLEN, HILL :

RIVKINS CAREY LOESBERG :

O'BRIEN & MULROY, a law :

partnership, and "JOHN DOE", :

said named JOHN DOE is in- :

tended to be a person :

whose name is unknown to the :

petitioner, and who was ap- :

pointed and employed by the :

SUPREME COURT OF THE STATE :

:

OF NEW YORK, COUNTY OF NEW YORK, as a law assistant in Special Term, Part I,

Respondents.

----------X

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Article 78 of the Civil Practice Law and rules, in the nature of a writ of mandamus, compelling the entry of an order by respondent Justices of the Supreme Court, New York County to reconsider all decisions heretofore made in connection with the case of M.W. Zack Metal Company v. International Navigation Corporation, et al., for a stay and for other relief,

And respondent Supreme Court of the State of New York, New York County having cross-moved for an order dismissing the petition,

And said proceeding having been argued by Anthony B. Cataldo of counsel for petitioner, by Abigail I. Peterson of counsel for respondent Supreme Court of the State of New York, New York County, by Helen M. Benzie and Vincent L. Leibell, Jr. of counsel for respondent The Federal Insurance Company, by Michael J. Carcich of counsel for respondents Newcastle Protection & Indemnity Association, The London Steamship Owner's Mutual Insurance Association and La Morte Burns & Co., Inc., and by respondent Donald B. Allen, pro se: and due deliberation having been had thereon.

It is unanimously ordered that the application be and the same hereby is denied in its entirety, the cross-motion granted and the petition dismissed. All respondents submitting

briefs shall recover of petitioner one bill of $74 costs and disbursements of this proceeding.

ENTER:

Clerk.

ORDER OF APPELLATE DIVISION

Dated November 22, 1983

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 22, 1983

Present - Hon. Justice Presiding

Leonard H. Sandler

Joseph P. Sullivan

John Carro

Sidney H. Asch

E. Leo Milonas Justices

----------X

M. W. ZACK METAL COMPANY, :

Petitioner, :

-against- :

THE SUPREME COURT OF THE STATE :

OF NEW YORK, COUNTY OF NEW YORK, :

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, CONTAM LINIE, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED, FEDERAL INSURANCE COMPANY, LA MORTE BURNS & CO., INC., DONALD B. ALLEN, HILL RIVKINS CAREY LOESBERG O'BRIEN & MULROY, a law partnership, and "JOHN DOE", said name JOHN DOE is intended to be a person whose name is unknown to the petitioner, and who was appointed and employed by the SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, as a law assistant in Special Term, Part I.,

Respondents.

M-5089
(17274)

The above-named petitioner hav-

ing moved for leave to reargue, or in the alternative to appeal to the Court of Appeals from, the order of this Court entered on September 20, 1983,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto, and due deliberation having been had had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

Clerk.

ORDER OF COURT OF APPEALS

Dated December 1, 1983

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of December A.D. 1983

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

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1 Mo. No. 1225 SSD 168

M. W. Zack Metal Company,

Appellant,

vs.

The Supreme Court of the State of New York, County of New York, et al.,

Respondents.

The appellant having filed notices of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Donald M. Sheraw
lerk of the Court

ORDER OF THE COURT OF APPEALS

Dated January 17, 1984

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of January A.D. 1984

PRESENT, Hon. Lawrence H. Cooke, Chief-Judge, presiding.

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1 Mo. No. 15

M. W. Zack Metal Company,

Appellant,

vs.

The Supreme Court of the State of New York, County of New York, et al.,

Respondents.

A motion having heretofore been made herein upon the part of the appellant (1) for vacatur of this Court's December 1, 1983 order which dismissed its appeal taken as of right, or, in the alternative, (2) for leave to appeal to this Court, papers having been submitted on the motion and due deliberation having been thereupon had, it is

ORDERED, that the same motion be and the same hereby is denied in each respect, with one bill of twenty dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

Order of December 6, 1982

of Crane, J.

SUPREME COURT : NEW YORK COUNTY

SPECIAL TERM : PART I

----------X

M. W. ZACK METAL COMPANY, :

Plaintiff, :

- against - :

INTERNATIONAL NAVIGATION CORP- :

ORATION OF MONROVIA, CONTAM : Index No.

LINIE, THOMAS R. MILLER & CO., : 4764-1970

as General Managers of UNITED : #33 of

KINGDOM MUTUAL STEAMSHIP PRO- : 9/16/82

TECTION & INDEMNITY ASSOCIA- :

TION, FEDERAL INSURANCE COM- :

PANY, LA MORTE BURNS & CO., :

INC., HILL BETTS YAMAOKA :

ENGLAR, JONES & HOUSTON, :

Defendants. :

----------X

STEPHEN G. CRANE, J.:

This motion by plaintiff, pur-

suant to CPLR 3025, seeking an order granting leave to serve an amended and supplemental complaint and to add a new party defendant is denied.

The portion of the proposed supplemental complaint that alleges a fraud perpetrated upon various United States Federal Courts and courts in the Federal Republic of Germany has been decided by the United States Court of Appeals for the Second Circuit and, therefore, is precluded by the doctrine of collateral estoppel. There the court held that llegations of fraud should have been raised in the courts where they allegedly occurred. (M.W. Zack Metal Co. v. International Navigation Corp. of Monrovia, 675 F2d 525, 529 (1982).)

As to any allegations of fraud upon this court in this action (which commenced in 1970), plaintiff's pleadings consist of no more than conclusory

allegations devoid of any substance. They are not shown to have any merit. Therefore, the motion to amend should be denied as to them. (Sharapata v. Town of Islip, 82 AD2d 350, 362 /1981/, affd 56 NY2d 332; East Asiatic Co. v. Corash, 34 AD2d 432, 436 /1970/; see Siegel, New York Practice, § 237, p. 290.) Besides, the proposed supplemental pleading in so remote from the original action seeking damages to a shipment of steel in January 1960, that if there is any merit to a claim of fraud in this action that caused additional damages, it ought to be brought in a separate action.

Defendants' request for dismissal of the action for failure to prosecute is not passed upon. It may be sought in a formal motion upon compliance with CPLR 3216.

The foregoing constitutes the

order and the decision of the court.

Dated: December 6, 1982

J.S.C.

Order dated February 23, 1983

of Crane, J.

SUPREME COURT : NEW YORK COUNTY

SPECIAL TERM : PART I

----------X

M.W. ZACK METAL COMPANY, :

Plaintiff, :

- against - :

INTERNATIONAL NAVIGATION : Index No.

CORPORATION OF MONROVIA, : 4784/70

CONTAM LINIE, NEWCASTLE PRO- : #89 of

TECTION & INDEMNITY ASSOC- : 1/11/83

IATION, THE LONDON STEAMSHIP :

OWNER'S MUTUAL INSURANCE :

ASSOCIATED LIMITED, FEDERAL :

INSURANCE COMPANY, LA MORTE :
BURNS & CO., INC., HILL BETTS :
YAMOAKA FREEHIL & LONGCOPE :
and BIGHAM ENGLAR JONES & :
HOUSTON, :
Defendants. :
----------X

STEPHEN G. CRANE, J.:

Motion for reargument is granted, and upon reargument the court adheres to its prior decision denying plaintiff's motion for leave to serve an amended and supplemental complaint and add a new party defendant.

In its decision, dated December 7, 1982, the court did not specifically address plaintiff's proposed third and supplemental cause of action. This cause relies on the undertaking of defendant Newcastle Protection & Indemnity Association to pay plaintiff a judgment pursuant to a final decision of the

German court. The third cause of action proclaims that this issue was tried in the United States District Court and the cause of action was dismissed "without prejudice." Plaintiff now contends that the dismissal was not final nor on the merits. But, it was final enough to impel plaintiff to appeal. The Court of Appeals for the Second Circuit affirmed. The majority wrote (M.W. Zack Metal v. Intern. Nav. Corp. of Monrovia, 675 F2d 525 at 530):

> "Finally, Zack contends that the district court erred in dismissing without prejudice its claim for $110,000 from the Insurers under the terms of the Newcastle guarantee. The district court, although recognizing that 'some money is owed by the defendants to plaintiff', dismissed this claim because Zack had failed to establish 'the entry of or the amount of a final judgment in the German courts.' Zack asserts that it presented sufficient evidence below, specifically the Newcastle guarantee and a translated copy of the decision

> of the Hanseatic Provincial Court in Germany, to establish a present right to recover under the guarantee. We disagree. Zack's evidence established only that the Hanseatic Provincial Court had assessed damages of $33,000 against the Charterer. Zack presented no evidence that an accounting of costs and interest had ever been made by the German appeals court. Accordingly, we agree with the district court that Zack has failed to prove that a 'final decision' for purposes of the guarantee has been entered in Germany." (Footnotes omitted)

The "without prejudice" annexed to the dismissal was obviously designed to preserve plaintiff's rights, if any, under the guarantee once a "final decision" is proven. Whatever additional meaning plaintiff seeks to invest in the clause "without prejudice," it simply does not guarantee the right, without any changed circumstances, to turn around and sue again on the still premature claim. Right or wrong, the Second Circuit has established that the claim

now asserted in the proposed third cause of action is not ripe. There is no "present right to recover under the guarantee" (675 F2d at 530). Because plaintiff is collaterally estopped from relitigating the prematurity question, the third cause of action is without merit at this time and should not be interposed. (See Sharapata v. Town of Islip, 82 AD2d 350, 362, affd 56 NY2d 332.)

In a similar failure to embrace the doctrine of collateral estoppel, plaintiff misreads the original decision as it addresses the fourth cause of action. This decision did not hold that plaintiff is precluded from establishing fraud on the various courts -- "the Federal courts who have dealt with this claim of the plaintiff and this court" (¶Thirty-Eighth) -- on the merits. the decision merely held that plaintiff is

precluded from relitigating the question of the proper forums in which such claims may be interposed. The Second Circuit held such claims must be brought in the forum that was induced by a defendant's fraud to enter an erroneous decision. With respect to a fraud on this court, plaintiff's proposed fourth cause of action charges Allen with misrepresenting that Burns was not a proper agent of the shipowner of charterer to receive process in this suit. How this in any way misled this court or caused damage to plaintiff is not pleaded. The claim is insufficient and inadequately set forth under CPLR 3016(b). Interposition of this cause of action may not be allowed. (Sharapata v. Town of Islip, supra; East Asiatic Co. v. Corash, 34 AD2d 432, 436.)

Though a second misreading of

the prior decision, where the court denied relief to defendants in the absence of a cross-motion and any showing of compliance with the 45-day notice of CPLR 3126, plaintiff's counsel makes a wild and unfounded charge against the court. He charges that the court is advising the defense on the law and is acting with partiality.

Plaintiff's attorney has overstepped the bounds of legitimate advocacy into unethical and unprofessional conduct. He merits stern rebuke. "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." (Code of Professional Responsibility, DR 8-102 (B).) In this era of unrelenting and unfounded attacks on the judiciary by the press and lay public, it is simply intolerable to suffer similar conduct from an officer

of the court. Respective counsel for the defendants are also worthy of criticism. It was their duty to respond to plaintiff's shocking accusation against the court. They have the duty to rally to the support of adjudicatory officials by responding to unjust criticism in order to enhance public confidence in our legal system. (Code of, Professional Responsibility, EC8-6). Instead, they remained silent.

Dated: February 23, 1983

Stephen G. Crane

Order dated April 15, 1983

of Crane, J.

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM, PARTI, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York 10007

Present: Hon. Stephen G. Crane

Justice

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M. W. ZACK METAL COMPANY

-against-

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA

----------x

The following papers numbered 1 to

No. 8 on Calendar of April 1983 1-4

Notice of Motion - Order to show 4-7

Cause and Affidavits Annexed

Upon the foregoing papers this motion for reargument is denied and a sep-

arate bill of costs and disbursements to the defendant filing opposing papers.

Date: April 15, 1983

J.S.C.

ENTER:

S.G.C.

J.S.C.

Order of January 4, 1983

of Saxe, J.

SUPREME COURT OF THE STATE

OF NEW YORK

COUNTY OF NEW YORK

---------- --X

In the Matter of the Petition	:	INDEX NO.
of ANTHONY B. CATALDO,	:	29191/82
Petitioner,	:	
-against-	:	JUDGE DAVID J. SAXE
DONALD B. ALLEN AND HILL, RIV-	:	

KINS, CAREY, LOESBERG, O'BRIEN & MULROY, A law Partnership,

Respondents,

To Annul and Vacate two Subpoenae served upon Petitioner, allegedly in an action in the United States District Court for the Southern District of New York, entitled M.W. ZACK METAL COMPANY, Plaintiff, against INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, JANSEN & COMPANY, CONTAM LINIE, HANS K. JANSEN, JURGEN K. KRAFT, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION, LIMITED,

Defendants.

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The application in the form of a Notice of Petition is denied. The

movant apparently seeks to quash two information subpoenae issued as a result of a Judgment entered after trial in the United States Federal District Court for the Southern District of New York. His premise is that the subpoenae are void because the underlying judgment was tainted by fraud. That being so, his application should be made at the situs of the judgment (the Federal Court) which has the power and authority to entertain his claim relating to the judgment. No costs.

This dicision shall constitute the order of this court.

Dated: January 4, 1983.

D.B.S.

J.S.C.

Order dated February 8, 1983

of Saxe, J.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter of the Petition of	
ANTHONY B. CATALDO,	
Petitioner,	
-against-	INDEX NO.
DONALD B. ALLEN and HILL, RIVKINS,	28191/82
CAREY, LOESBERG, O'BRIEN & MULROY,	
A law Partnership,	JUDGE
Respondents,	DAVID B.
To Annul and Vacate Two Sub-	SAXE
poenae served upon Petitioner,	
allegedly in an action in	
the United States District	
Court for the Southern	
District of New York, entitled	
M.W. ZACK METAL COMPANY,	
Plaintiff, against INTERNATIONAL	

:

NAVIGATION CORPORATION OF MON- :
ROVIA, JANSEN & COMPANY, CONTAM :
LINIE, HANS H. JANSEN, JURGEN :
K. KRAFT, NEWCASTLE PROTECTION :
& INDEMNITY ASSOCIATION, THE :
LONDON STEAMSHIP OWNER'S MUTUAL :
INSURANCE ASSOCIATED, LIMITED, :
Defendants. :

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The movant has not introduced any new facts, or pointed out any legal errors made by this Court upon his motion to reargue. The motion is therefore denied. As stated previously, the movant's application should be made in the Federal Court where the judgment was obtained.

Dated: February 8, 1983.

D.B.S.

J.S.C.

Order dated May 16, 1983

of Saxe, J.

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM, PARTI

Index No. 28 191/82

----------x

CATALDO :

Present:

against :

Hon. David B. Saxe

ALLEN :

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Petitioner's second motion to reargue is denied for the same reasons as are set forth in the decision of 2/8/83 denying petitioner's first motion to reargue.

Dated: 5/16/83

D.B.S.

J.S.C.

Order dated March 8, 1983

of Wallach, J.

SUPREME COURT : STATE OF NEW YORK

SPECIAL TERM : PART I

----------X

In the Matter of the Petition : Index No.
of ANTHONY B. CATALDO, : 28191/82
Petitioner, : Motion No.
-against- : 71
DONALD B. ALLEN, et al., : of Feb. 25,
Respondents. : 1983

----------X

WALLACH, RICHARD W., J.:

Petitioner Anthony B. Cataldo, Esq., seeks to hold respondents in contempt for failing to obey a directive of this court contained in an order to show cause dated January 12, 1983 (Saxe, J.) which restrained respondents from taking any further proceedings with respect to two information subpoenae issued in a certain United States Dis-

trict Court (S.D.N.Y.) action pending reargument or petitioner's application to quash the subpoenae here. Prior to issuance and service of that order to show cause, respondents had been granted leave by the federal court to renew their application therein to compel Cataldo to respond to the subpoenae in the event Cataldo failed to provide such answers by January 10, 1983. On or about February 12, 1983 respondents, in fact, moved in federal court to enforce the subpoenae. On February 18, 1983, the federal court held petitioner's client in contempt for failure to respond to the subpoenae. Meanwhile, petitioner's pending motion for reargument was denied by this court in a memorandum decision published in the New York Law Journal of February 17, 1983 (Saxe, J.). The court reiterated that petitioner's remedy rested with the federal court.

A review of the record indicates that petitioner has failed to demonstrate that any of his rights or remedies were defeated, impaired, impeded or prejudiced by respondents' actions. Accordingly, Cataldo's application is denied and the petition is dismissed.

The Clerk of this Court is authorized and directed to enter judgment in favor of respondents and against petitioner dismissing the proceeding accordingly.

Dated: March 8, 1983

R.W.W.

J.S.C.

Order of April 25, 1983

of Wallach, J.

SUPREME COURT : STATE OF NEW YORK

SPECIAL TERM : PART I

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In the Matter of the Petition :

of :Index No.

ANTHONY B. CATALDO, :28191/82

Petitioner, :Motion No.

- against - : 120 of

DONALD B. ALLEN, et al., :April 6,

Respondents. : 1983

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WALLACH, RICHARD W., J.:

Motion by petitioner, Anthony B. Cataldo, for reargument of the prior decision of this court dated March 8, 1983, is granted, and upon such reargument the original decision is adhered to with the following clarification.

Cataldo contends that respondent Donald B. Allen and his law firm com-

mitted a contempt by violating the terms of two temporary restraining orders dated January 12 and February 15, 1983. The motion for reargument is defective in failing to supply copies of those orders, as well as a copy of the federal subpoena. However in the interest of judicial economy, this court will assume (most favorably to petitioner) that he had accurately described this content.

According to Cataldo, Allen and his law firm violated the restraining orders by moving in the U.S. District Court for the Southern District of New York to hold Cataldo's client, M. W. Zack Metal Company, in contempt on February 4, 1983, at a time when the temporary restraining orders were allegedly in full force and effect. The District Court granted that contempt application, and under constraint of that order Cataldo paid the federal judgment

taxed for costs on appeal in the sum of $1,376.98 by the check dated February 25, 1983.

It is now clear that the temporary restraining orders of January 12 and February 15, 1983, issued out of this court ex parte (Saxe, J.) were void in lacking subject matter jurisdiction and the U.S. District Court properly ignored them. A state court has no jurisdiction to interfere with the collection of enforcement of a federal judgment. As the Supreme Court of the United States held in Donovan v. City of Dallas, 377 U.S. 408, 413:

> "Petitioners being properly in a federal court had a right granted by Congress to have the court decide the issues they presented...The Texas courts were without power to take away this Federal right by contempt proceedings or otherwise."

Thus, these restraining orders were void ab initio. Where a temporary

restraining order contains an injunctive provision which the court has no authority to issue, there can be no contempt as a matter of law for its disobedience (DiFate v. Scher, 45 AD2d 1002).

In view of the unnecessarily scurillous content of petioner's papers on this motion (see particularly Cataldo's reply affidavit sworn to April 4, 1983, esp. at pp. 7, 9, and 12), forty dollars motion costs are awarded in favor of respondents and against petitioner under CPLR 8202. This sum shall be in addition to the fifty dollars which may be taxed as costs by respondents upon entry of the judgment to be settled herein (CPLR 3201, 1825 Realty Co. v. Gabel, 44 M. 2d 168, resettlement den. 44 M. 2d 767).

Let respondents settle a judgment accordingly dismissing the pro-

ceeding.

It is so ordered.

Date: April 25, 1983

R.W.W.

J.S.C.

SUPREME COURT : NEW YORK COUNTY

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M.W. ZACK METAL COMPANY,

Plaintiff,

- against -

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, CONTAM LINIE, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED, FEDERAL INSURANCE COMPANY, LA MORTE BURNS & CO. INC., HILL BETTS YAMAOKA FREEHILL & LONGCOPE and BIGHAM ENGLAR JONES & HOUSTON, and DONALD B. ALLEN,

Defendants.

THIRD AMENDED AND SUPPLEMENTAL COMPLAINT

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The plaintiff, M.W. ZACK METAL COMPANY, by its attorney, ANTHONY B. CATALDO, complaining of the defendants alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

FIRST: That plaintiff is a corporation organized under the laws of Michigan, having a principal place of business in

Detroit, Michigan.

SECOND: That upon information and belief, INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, is a corporation organized under the laws of Liberia, that CONTAM LINIE, is a partnership with a principal place of business in Hamburg, Germany; that NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION is an unincorporated association having its principal place of business in England; and that THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED, is a corporation organized under the laws of England and has a principal place of business in the City of London, England; that FEDERAL INSURANCE COMPANY is a corporation organized under the laws of the State of New Jersey but having a principal place of business and it is duly admitted to do business within the State of New York; that LA MORTE BURNS & CO., INC., is a domestic corporation; that HILL BETTS YAMAOKA FREEHILL &

LONGCOPE is a partnership of persons admitted to practice law in the State of New York having a principal place of business in the County and State of New York; that BIGHAM ENGLAR JONES & HOUSTON is a partnership of persons admitted to practice law in the State of New York having a principal place of business in the County and State of New York; and that defendant Donald B. Allen has at all times hereinafter mentioned claimed to be a lawyer practicing in the State of New York; and represented LA MORTE BURNS & CO., INC.; LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED and NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, LIBERIA and CONTAM LINIE and its partners.

THIRD: That at all the times hereinafter mentioned late in 1959 and early 1960 the plaintiff was a dealer in metals and it had purchased 93 coils of hot rolled

steel sheets in Europe and it had caused them to be shipped to New York; that defendant INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA was the owner of the S.S. SEVERN RIVER engaged in the common carriage of goods by sea; that CONTAM LINIE was the charterer of said S.S. SEVERN RIVER; NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION and LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED were organizations insuring charterers and shipowners against their liabilities arising from their operation of steamships, among which liabilities were that of a common carrier of goods by sea, for injury, loss or damage to cargoes of goods being so carried; that CONTAM LINIE and its partners were duly entered in NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA was duly entered in the LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION and said owners and charterers and their

vessel, the S.S. SEVERN RIVER, were each entitled to be insured for their liabilities as common carriers as aforesaid by their respective insurers; that FEDERAL INSURANCE COMPANY was in the business of insuring, separately, owners of cargoes for loss or damage occasioned to such goods and that it had agreed and did issue a policy of insurance to plaintiff insuring the latter against loss or damage to said 93 coils of steel sheets as in said policy mentioned; that LA MORTE BURNS & CO. INC., is a claims settler in New York City representing both NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED and their insureds; that HILL BETTS YAMAOKA FREEHILL & LONGCOPE was a law firm representing said NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED and their insureds and said claim settler above-named; and BIGHAM ENGLAR JONES & HOUSTON is a law

firm representing FEDERAL INSURANCE COMPANY.

FOURTH: That plaintiff's 93 coils of hot rolled steel sheets were shipped aboard the S.S. SEVERN RIVER during the month of January 1960, under bill of lading No. 35 in good order and condition, and were carried to Port of New York where they were discharged not in the same good order and condition but in a seriously damaged condition.

FIFTH: That plaintiff duly filed claims upon the shipowner and charterer of the S.S. SEVERN RIVER and upon FEDERAL INSURANCE COMPANY for payment of its loss to such steel.

SIXTH: That defendant FEDERAL INSURANCE COMPANY having unlawfully refused to make payment to plaintiff for the damage to said goods, palintiff commenced a suit against it in the Supreme Court, New York County to recover for a breach of its insurance policy.

SEVENTH: That said shipowner and charterer not having paid for the same loss although it was caused by them or those for whom they were responsible and jurisdiction over them not being available to the courts in the State of New York at the time of loss, plaintiff retained counsel in Hamburg, Germany, who lawfully commenced a suit against said shipowner and charterer in the court of Hamburg, Germany to enforce payment for the damage to the said 93 coils of steels caused by said shipowner and charterer as aforesaid.

EIGHTH: That plaintiff claimed that its loss by reason of the damage to its 93 coils of steel was approximately $79,723.74 and filed appropriate demands therefore in said suit.

NINTH: That on or about the 14th day of March 1968 and while plaintiff's suit against FEDERAL INSURANCE COMPANY in this court was being tried before the late HONOR-

ABLE JOHN L. FLYNN and a jury; that action was settled for the sum of $40,107. with interest to the date of payment from February 10, 1960, with the provision that the suit in Germany should be continued to be prosecuted by plaintiff and that out of the recovery affectuated in that suit, the palintiff was to account to FEDERAL INSURANCE CO. for 55 percent of the net recovery, meaning after deduction for all expenses of the attorneys fees and disbursements paid or incurred in the suit or suits against the shipowner and charterer of their insureds, deemed by plaintiff necessary to effect recovery for its claims aforesaid.

TENTH: That it was a tenet of said settlement between plaintiff and FEDERAL INSURANCE COMPANY and well-known and recognized by the parties that plaintiff's total damage claims exceeded the amount of the settlement; that the suits commenced and being prosecuted by plaintiff against

the shipowner and charterer would provide a recovery out of which the balance of plaintiff's loss over and above the amount paid by FEDERAL INSURANCE COMPANY in said settlement, together with the attorney's fees and costs and expenses paid or incurred in the suits against the shipowner and charterer of the S.S. SEVERN RIVER, would be recovered from the proceeds from such suits; that in order to induce plaintiff to enter into such agreement of settlement, the right of FEDERAL INSURANCE COMPANY to be subrogated to the rights of the palintiff against said third parties causing the loss would be limited to the receipt of 55 percent of the net proceeds, as if and when obtained in said litigation against the shipowner and charterer aforesaid; and said FEDERAL INSURANCE COMPANY further promised plaintiff that it would not interfere with plaintiff's prosecution of such litigation.

ELEVENTH: That on or about the 9th day of December 1969 and despite the fact

that the court in Germany had rendered an interlocutory judgment fixing liability for the damages upon the defendants in the suit at Hamburg, Germany and in disregard of the terms and conditions of the aforesaid stipulation of settlement between plaintiff and FEDERAL INSURANCE COMPANY all of which were well-known to all defendants, said defendants conspired among themselves to and did effectuate a settlement of the liability of the shipowner and of the charterer to the FEDERAL INSURANCE COMPANY for the latter's alleged proportionate interest, in said suit in the courts of Hamburg, Germany, resulting in FEDERAL INSURANCE COMPANY receiving a sum of money the amount of which defendants have refused to divulge to plaintiff despite demands therefore.

TWELFTH: That said settlement was effectuated without the knowledge and consent of the plaintiff and contrary to the terms and conditions of the agreement of

FEDERAL INSURANCE COMPANY with plaintiff entered into before the late HONORABLE JOHN L. FLYNN, on or about the 14th day of March 1968, permitting plaintiff to continue said suit in Germany and to account to said FEDERAL INSURANCE COMPANY as aforementioned.

THIRTEENTH: That all defendants were aware and knew of the terms and conditions of the agreement of FEDERAL INSURANCE COMPANY with plaintiff entered into before the late HONORABLE JOHN L. FLYNN on or about the 14th day of March 1968 and their action herein was in fraud of plaintiff's rights under said settlement agreement.

FOURTEENTH: That by reason of the action aforesaid, the plaintiff has suffered damages because proceeds have been realized by FEDERAL INSURANCE COMPANY from the defendants in the suit in Germany aforesaid as a result of the efforts of the plaintiff in commencing and prosecuting the suits aforesaid and said proceeds are being re-

tained and were inteded by the defendants to be retained by FEDERAL INSURANCE COMPANY free of the agreed charges upon any proceeds from said suit for attorney's fees and disbursements, as in the settlement agreement stated and because said settlement was designed and planned to give the ocean carriers and their insurers alleged means of defeating the plaintiff's suit against them.

FIFTEENTH: That the action of the defendants INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, CONTAM LINIE, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED was designed to aid and abet in defrauding plaintiff of its rights under the settlement agreement reached before JUDGE FLYNN as aforesaid and such action was an admission of liability or has created an estoppel from denying liability to the plaintiff in the suit pending in Hamburg, Germany in the sum of

$79,723.74 with interest and the cost and expenses recoverable therein by plaintiff, as provided under the Law of the Republic of West Germany or against plaintiff's claim to cargo damage wherever the same may be enforced.

SIXTEENTH: That by reason of the premises aforesaid plaintiff has suffered damages in the sum of $200,000. at the hands of the defendants INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, CONTAM LINIE, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION LIMITED, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED and FEDERAL INSURANCE COMPANY no part of which has been paid although duly demanded.

AS AND FOR A SECOND CAUSE OF ACTION

SEVENTEENTH: Plaintiff repeats and reiterates all the allegations contained in paragraphs First through Sixteenth herein set forth.

EIGHTEENTH: That the said agreement

of December 9, 1969 made among the defendants was negotiated and made and signed and delivered within the City of New York by LA MORTE BURNS & CO. INC., of 26 Broadway, Borough of Manhattan, representing the defendants INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, CONTAM LINIE and NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED as the latters' business representative and the law firm of HILL BETTS YAMAOKA FREEHILL & LONGCOPE, ESQS. also of 26 Broadway, New York, representing said defendants and LA MORTE BURNS & CO. INC., as their attorneys, and BIGHAM ENGLAR JONES & HOUSTON, ESQS., representing the defendant FEDERAL INSRUANCE COMPANY.

NINETEENTH: That said BIGHAM ENGLAR JONES & HOUSTON ESQS., were the attorneys of record in the suit brought by plaintiff in this court against FEDERAL INSURANCE

COMPANY and were engaged in the trial of said case for that defendant when the agreement of settlement was made before the late HONORABLE JOHN L. FLYNN and they were well aware of the terms and conditions of said agreement.

TWENTIETH: That during the continuation of the prosecution of the plaintiff's action against the shipowner and charterer, plaintiff delivered to LA MORTE BURNS & CO. INC., a true transcript of the settlement agreement reached before the late HONORABLE JOHN F. FLYNN as a consequence of which said defendants, and LA MORTE BURNS & CO. INC., and NEW CASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED and HILL BETTS YAMAOKA FREEHILL & LONGCOPE were likewise aware of the terms and conditions of said agreement or should have known said terms and conditions.

TWENTY-FIRST: That all defendants

having full knowledge of the plaintiff's total interest in the proceeds to be derived from the pending suit in the courts of Hamburg, Germany as aforementioned and despite such knowledge and in disregard thereof, acting in concert, conspired among themselves unlawfully and willfully, to defraud plaintiff as aforesaid by misuse of the purchase and sale of the rights of FEDERAL INSURANCE COMPANY as stated above.

TWENTY-SECOND: That by reason of said conspiracy all defendants are liable to plaintiff for the latter's damages aforementioned in the sum of $200,000. none of which has been paid although duly demanded.

AS AND FOR A THIRD AND SUPPLEMENTAL CAUSE OF ACTION AS AGAINST NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION PLAINTIFF RESPECTFULLY ALLEGES:

TWENTY-THIRD: That on or about the 15th day of June, 1971, the Superior Court of Hamburg, Germany duly adjudicated that

defendant, CONTAM LINIE and, its constituent partners HANS H. JANSEN, and JURGEN KARL KRAFFT and their firm, JANSEN & CO. to be condemned to pay to the plaintiff, M.W. ZACK METAL CO., $64,018.03 plus five percent interest since February 10, 1960, within an action there commenced by this plaintiff against the shipowner and the charterers of the S.S. SEVERN RIVER.

TWENTY-FOURTH: That on or about the 29th day of November, 1971, the defendants NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION offered to plaintiff to deliver its own duly executed undertaking, pending appeal from such judgment of June 15th, 1971, in the preceeding paragraph mentioned, in exchange for plaintiff's promise to refrain from executing upon the said judgment.

TWENTY-FIFTH: That plaintiff did make the promise referred to in the preceeding paragraph and NEW CASTLE PROTECTION & INDEMNITY ASSOCIATION did execute its own

undertaking and delivered the same to plaintiff, stating that it will pay the sum of the judgment appeal from, plus interest and costs "in the amount to which the plaintiff is entitled pursuant to a final decision of the German court or on basis of a settlement agreement". Attached hereto and made a part thereof is a copy of an accurate English translation of said undertaking and it is marked Exhibit "A".

TWENTY-SIXTH: That plaintiff accepted the said undertaking and performed its promise on its part to be performed, in reliance upon said undertaking of defendant, NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION.

TWENTY-SEVENTH: That said appeal from the judgment of June 15, 1971 was prosecuted after delivery of said undertaking to plaintiff by a lawyer or lawyers appointed by said defendant NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION to the HANSEATIC PROVINCIAL COURT, of Hamburg, Germany which on

January 9th, 1975, did pronounce its final judgment in the case mentioned in the undertaking of NEW CASTLE PROTECTION & INDEMNITY ASSOCIATION, affirming the said judgment appealed from.

TWENTY-EIGHTH: That said NEWCASTLE PROTECTION & INDEMNITY ASS. failed or refused to pay plaintiff the sums due under its said undertaking pursuant to a decision of the appeal court in Germany as stated in its said undertaking.

TWENTY-NINTH: That by reason of the premises aforesaid plaintiff commenced an action, on or about August 8th, 1978, in the United States District Court for the Southern District of New York against said NEWCASTLE PROTECTION & INDEMNITY ASSN. and others, for several causes of action, among which, was a cause of action stated by plaintiff against said NEWCASTLE PROTECTION & INDEMNITY ASSN. to recover what was due from said NEW CASTLE PROTECTION INDEMNITY ASSN. under such undertaking.

THIRTIETH: That on or about the 18th day of February 1981 the District Court for the Southern District of New York ordered a trial of the plaintiff's cause of action against NEWCASTLE PROTECTION & INDEMNITY ASSN. upon the undertaking aforesaid to be tried before it without a jury although a jury had been duly demanded.

THIRTY-FIRST: That that plaintiff's said cause of action against NEWCASTLE PROTECTION & INDEMNITY ASSN. on the said undertaking, proceeded to trial before the court on the first day of April 1981, and at the finish thereof the court dismissed the cause of action without prejudice, finding, nevertheless, that there was money due the plaintiff M.W. ZACK METAL COMPANY, from said NEWCASTLE PROTECTION & INDEMNITY ASSN. under said undertaking.

THIRTY-SECOND: That by reason of the premises aforesaid there is now due and owing from NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION to plaintiff the sum of $200,000. with interest from the said 29th day of November, 1971.

AS AND FOR A FOURTH AND SUPPLEMENTAL CAUSE OF ACTION AS AGAINST THE DEFENDANT, DONALD B. ALLEN, PLAINTIFF RESPECTFULLY ALLEGES:

THIRTY-THIRD: That the defendant, DONALD B. ALLEN, has since the inception of this law suit held himself out to be an attorney-at-law having been associated with the law firm of HILL, BETTS, YAMAOKA, FREE-HILL & LONGCOPE, ESQS. the attorneys of record for defendant NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED, at the start of this suit.

THIRTY-FOURTH: That at the commencement of this law suit said defendant DONALD B. ALLENwas in charge of the litigation for said defendants being represented by HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE, ESQS. andsubsequently, he became associated with the law firm of CICHANOWICZ & CALLAN, ESQS. when in 1978 the plaintiff's suit as stated in the Third and Supplemental Cause of Action abovementioned was commenced and the said DONALD B. ALLEN continued to assume charge of that law suit for all said defendants therein named, including NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAM-SHIP OWNER"S MUTUAL INSURANCE ASSOCIATION LIMITED and has since 1982 associated himself with the law firm of HILL, RIVKINS, CAREY, LOESBERG, O'BRIEN & MULROY, ESQS., who were substituted for CICHANOWICZ & CALLAN, ESQS.

as attorneys for NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED, with which firm he is presently associated and is continuing in charge of said litigation involving the said defendants.

THIRTY-FIFTY: That the litigation in this court and the litigation conducted in the United States District Court for the Southern District Court of New York relate to the same basic state of facts, viz; that in January - February 1960 plaintiff suffered damage to its shipment of 93 coils of steel sheets carried on board the S.S. SEVERN RIVER under its Bill of Lading No. 35, from Antwerp to New York, where, upon arrival the same was found seriously damaged from causes usually associated with the handling and care of cargo on board ship.

THIRTY-SIXTH: That despite the efforts of the plaintiff in suing for its loss to its steel in various Federal Courts and in the courts of Germany the plaintiff has not been paid for such damage despite the fact that a judgment was duly recovered on the merits in the trial court of Hamburg, Germany, and an appeal therefrom ensued and a final judgment of the Appeals Court was rendered affirming said judgment appealed from.

THIRTY-SEVENTH: That said condition of non-payment for its loss has been caused by the fraudulent and deceitful actions of said DONALD B. ALLEN in advancing false and untrue facts to the courts and asserting inappropriate law not dispositive of the truth of the matters in said litigations, in that, said ALLEN stated without proof (1) that said undertaking promised payment upon the entry of judgment, when the truth is that said undertaking promised payment pursuant to decision of a German court upon the appeal from the judgment of June 15, 1971; (2) that no judgment was entered in the German courts stating the amount of recovery under the undertaking, when in truth, the undertaking promised payment pursuant to a final decision of a German Court; (3) that the Federal Court could not ascertain the amount due upon the undertaking, when that court had the power to find the amount of the recovery and there was evidence adduced from which said amount could have been determined; (4) said ALLEN stated untruthfully, that plaintiff was obliged to go to Germany to fix the recovery in the action brought on the undertaking when in fact the Federal Court had jurisdiction of the case and it had the power to decide the matter

but did not; (5) that said ALLEN asserted the false fact that NEWCASTLE had a lien, menaing a general lien, upon the proceeds due plaintiff under the judgment in the German Courts in favor of the plaintiff whereas it did not have such a lien; (6) that said ALLEN asserted that NEWCASTLE'S lien upon the proceeds of the judgment in the German Court was based upon an offset against plaintiff that NEWCASTLE had upon the proceed of the said judgments, when in truth, said NEWCASTLE had no such offset nor did it have any liquidated claim whatever against the plaintiff; (7) that said ALLEN caused the service of the summons in Federal Court upon CONTAM LINIE and its partners, the charterers of the S.S. SEVERN RIVER to be set aside by stating the false fact that the person served was not a proper agent to receive said process whereas it later appeared that the agent was capable of seeing to it that CONTAM LINIE would have had sufficient notice of such service and that the person served had represented CONTAM LINIE since 1960; (8) that said ALLEN also represented and stated to the Federal Court that the defendant INTERNATIONAL NAVIGATION COMPANY OF MONROVIA was not represented by the person served with

process nor was he a proper agent to receive process when in truth, that person or persons were the agents of said shipowner for more than ten years prior to the service and he had authority to receive process in the suit in the Federal Court as herein alleged; (9) that said ALLEN stated to this court that on AUGUST C. BURNS was not a proper agent of the shipowner or the charterer to receive the process in this suit when said ALLEN took the deposition of said BURNS in January 1981 and said BURNS testified that he had represented the shipowner and charterers ever since 1960; (10) that said ALLEN falsely stated the reasons why depositions being taken in the Federal Court were dilatory actions of the plaintiff when, in truth, the actions of said ALLEN delayed the deposition by harassing actions upon the plaintiff; (11) that said ALLEN caused the depositions of defendants NEWCASTLE and of LONDON STEAMSHIP to be unlawfully curtailed by order of the court based upon untruthful statements of facts to induce the court to the grant of that relief; (12) that said ALLEN concocted a plan or scheme to allege a counter-claim for malicious prosecution against plaintiff based upon the actions of the plaintiff in seeking recovery

for the damage to its steel, and argued from that plaintiff's claims to damage to its steel were harassing actions, when in truth, plaintiff's actions were lawful and not without foundation, and that said ALLEN has uttered and written many more false claims to facts and law to cause the courts to be deceived as to the equities in the case as will be shown upon the trial of this case.

THIRTY-EIGHTH: That the Federal Courts who have dealt with this claim of the plaintiff and this court, as well, have been deceived by the said collusive action of said ALLEN who intended and did unlawfully deceive the courts and this plaintiff as in Section 487 of the Judiciary Law is proscribed and prohibitied.

THIRTY-NINTH: That by reason of the premises aforesaid plaintiff is entitled to recover from said DONALD B. ALLEN, and its principals, general and specific damages in the sum of $200,000. and treble damages of $600,000. as stated in said Section 487 of the Judiciary Lae.

WHEREFORE plaintiff demands judgment against the defendants NEWCASTLE PROTECTION & INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION LIMITED, FEDERAL INSURANCE COMPANY AND LA

MORTE BURNS & CO. INC., in the sum of $200,000. for the reasons stated under the First and Second Causes of Action, and against NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION LIMITED for an additional sum of $200,000. for the reasons stated under the Third and Supplemental Cause of Action and against the defendants DONALD B. ALLEN, NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION and THE LONDON STEAMSHIP OWNER'S MUTUAL INSURANCE ASSOCIATION, CONTAM LINIE and its partners, INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA, and LA MORTE BURNS & CO. INC., for the sum of $800,000. together with interest and costs of this action.

Yours, etc.,

ANTHONY B. CATALDO
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Office - Supreme Court
FILED
JUN 14 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1776

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

M. W. ZACK METAL CO.,

Petitioner,

—against—

THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK, et al., etc.,

Respondents.

RESPONDENT FEDERAL INSURANCE COMPANY'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

RESPONDENT FEDERAL INSURANCE COMPANY'S* BRIEF IN OPPOSITION

This is the fourth time the M. W. Zack Metal Co. has petitioned this Court for a Writ of Certiorari during the twenty-three year period the matter has been litigated in various courts. The first three were denied at 423 U.S. 835, (1975); 439 U.S. 894, (1978); and 103 S.Ct. 449 (1982).

Petitioner's "Concise Statement Of The Case" covers twenty-three pages. It is replete with allegations that American and German Courts have been "deceived" by various parties and attorneys who acted "shamelessly" (p. 9)** by "falsifying facts" (p. 10), using "unlawful actions" (p. 11), "false arguments" (p. 20), "deceit" (p. 28), "paying for these decisions" (p. 32) all resulting in "a real, live, stinking occurance [sic] in the annals of modern-day justice" (p. 35).

Petitioner also accuses both State and/or Federal Courts of having "unconstitutionally decided" matters (p. 36); "arbitrarily and capriciously" denying due process (pp. 37); "arbitrary conduct" (p. 43), and issuing decisions that "express the personal predilections of the law assistant, the architect of this decision" (pp. 44).

This respondent, Federal Insurance Company cannot possibly improve upon the language of Judge Meskill in his opinion for the Court of Appeals for the Second Circuit in *M. W. Zack Metal* v. *International Navigation Corporation of Monrovia,* 675 F.(2d) 525, 530, (2d Cir.) *cert. den.* 103 S.Ct. 449, (1982), when he said:

> "We do not approve of the scatter shot approach taken by Zack's counsel over the last twenty-two years in seeking to recover for the cargo loss. We do not know, however,

*Federal Insurance Company is a wholly owned subsidiary of the Chubb Group of Insurance Companies.

**Page references are to the Petition.

whether it should be attributed to incompetence or bad faith."

WHEREFORE, it is submitted that the writ should be denied in all respects.

Dated: June 12, 1984.

Respectfully submitted,

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Office - Supreme Court, U.S.
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- against -

THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, et al., etc.,

Respondents.

REPLY BRIEF TO THE BRIEF OF FEDERAL INSURANCE COMPANY, A RESPONDENT

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REPLY BRIEF TO THE BRIEF OF FEDERAL INSURANCE COMPANY, A RESPONDENT

The brief of respondent, FEDERAL INSURANCE COMPANY, states no reason why the Question Presented is not valid, nor why the reasons this writ should issue are incorrect. They do not even discuss them. Ignoring them is conceding the truth of the facts and the applicability of the law presented.

Nor are they entitled to have the past denial of the three petitions for certiorari by this Court considered as reasons for denying the writ. Obviously, "not certworthy" does not mean "no merits". Nor is the "hit and run" tactic employed by them, a lawful denial of the petitioner's effort to state "The Case". In the context, the quoted materials are valid expressions of the facts intended to be expressed.

They quote Judge Meskill, which

they have done many, many times in the lower courts, doing so continuously, not to prove a point, but to mislead those courts into accepting that the quoted portion is proof of Judge Meskill's impatience with appellant's counsel, for a reason that is not a true fact; see the petition, 103 S.Ct. 449 (1982).

Nothing presented by the brief is a valid reason for this Court not to review the petition on its own merits. What petitioner has tried to do is to present an unbroken line of unconstitutional decisions below, for proof of unconstitutional violations; but for proof of certworthiness he shows that those decisions were criminally induced by a particular law assistant, whose identity would not be revealed by the Court, though demanded, for "policy" reasons rather than on the merits. Also, when, in cooperating

with the District Attorney of New York County, petitioner sought in 1982 to examine in discovery a defendant suspected of passing consideration for obstruction of justice, but that defendant has been litigating that question all of the time up to the present and is continuing to litigate the issue to avoid discovery, shouldn't this Court enter this alleged conflict on the side of the constitutional rights which are in the balance?

Petitioner has come to this honorable Court in the hope that it would right these unconstitutional actions, just as it did in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, where Mr. Schware's rights were vindicated after many rebuffs in State proceedings, spanning over four years.

WHEREFORE, certiorari should be

granted.

Dated: New York, New York
June 13, 1984.

Respectfully submitted,

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